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03/10/07

HIGH COURT OF CHHATTISGARH AT BILASPUR

M.C.C. No. 53 of 2006

Applicant / Petitioner : **Sardar Jarnail Singh Arora**

VERSUS

Respondents : **Union of India and others**

ORDER

POST ON 1st OCTOBER 2007

Sd/-
Dhirendra Mishra
Judge

28/09/2007

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HIGH COURT OF CHHATTISGARH AT BILASPUR

M.C.C. No. 53 of 2006

Applicant / Petitioner : **Sardar Jarnail Singh Arora**
S/o Late Deshraj Singh Arora,
Aged 46 years, Occu: Contractor,
R/o Khandupara : Station Road,
Dongargarh, Distt. Rajnandgaon,
(Chhattisgarh State)

Through Registered attorney
Harjeet Singh Arora, aged 48 year
S/o Late Deshraj Singh Arora,
R/o Khandupara : Station Road,
Dongargarh, Dist. Rajnandgaon,
(Chhattisgarh State)

VERSUS

Respondents :

1). **Union of India, Ministry of Railways, Represented by the General Manager, South East Central Railway, Bilaspur Zone, Bilaspur (C.G.) Chhattisgarh.**

2). **Union of India, Ministry of Railways, Represented by the Chief Engineer, South East Central Railway, Bilaspur.**

3). **Union of India, Ministry of Railways, Represented by the Divisional Railway Manager (Engineering), South East Central Railway, Nagpur Division, Nagpur (M.S.)**

Present:

Mr. V.P. Kukde with Mr. P.P. Sahu, Advocates for the applicant.
Mr. P.S. Koshy with Mr. Vivek Verma, Advocates for the respondents.

O R D E R

(1st October 2007)

Dhirendra Mishra, J

The petitioner has filed the instant petition under Section 11 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') for appointment of sole arbitrator with the averment that an agreement was entered into between the parties on 21.6.1995 for the work pertaining to "supply and delivery in stacks 50 mm gauge hard granite or similar quality stone ballast of approved quality at Dongargarh depot and loading the same in to any type of Railway wagons". The stacking ground for ballast was to be made available by the Railways

adjacent or easily approachable to the railway line. However, insufficient land was made available after a lapse of considerable time at a distance and thus delay in performance of work was attributable to the Railway Department, however, substantial amount was withheld as deposit. The railway admitted that they did not have any drawings or location available at the time of tendering and they also increased the contract period from 3 years to 6 years. The bill towards the work executed was paid on 5.12.2003. Royalty clearance was issued by the railways on 24.10.2004 and proposal for release of security deposit was sent on 10.4.2004. The payment made on 5.12.2003 cannot be termed as final bill payment as return of the security deposit is the last payment under the contract agreement and prior to the acceptance of payment against the final bill he has raised protests for failure of the railway department in discharging its legal obligation. A legal notice dated 2.9.2004 was sent to the respondents raising claims under various heads. However, the same was neither replied nor appointment of arbitrator was made. Initially, a civil suit was filed for appointment of arbitrator before the learned District Judge, Rajnandgaon and the same was withdrawn subsequently. Thereafter, the instant application has been filed.

2. In reply to the above petition, the respondents have raised a preliminary objection that there is no arbitration clause in the agreement, therefore, the instant application under Section 11 of the Act is not maintainable. At the time of settlement of final dues on 12.4.2004, the petitioner had signed a 'No Claim Certificate' of Annexure R/6, the petitioner at the time of finalization of the bill did not raise any objection and the delay in execution of the work was on account of failure of the petitioner to commence the work forthwith. Penalty at the rate of 10% was imposed towards short supply of ballast as per condition 9.1 (ii) of the agreement and thus, a penalty of Rs.5,73,889/- was imposed. The final bill was paid to the petitioner on 6.1.2004. The petitioner submitted royalty clearance certificate on 24.3.2004. Proposal for refund of security deposit was sent on 10.4.2004 and security deposit submitted through bank guarantee was refunded to the petitioner on 24.8.2004. Referring to Clause 64(1)(IV) of the General Conditions of the Contract (in short 'G.C.C.') it is submitted that if the contractor does not prefer final claims in

writing within a period of 90 days after receiving information from the Government that final bill is ready for payment, he shall be deemed to have waived his claim and the railway stands released of the liability under the contract. The petitioner was informed by authorities of the respondents vide Annexure R/2 that the matter cannot be referred to arbitration as the contractor has failed to observe provisions of Clause 64(1)(iv) of the G.C.C. Vol. II.

3. Respondents in their reply have denied the existence of arbitration agreement between the parties. However, during argument learned counsel for the respondents has conceded that GCC is applicable and Clause 63 and 64 of the GCC provide for settlement of disputes and demand for arbitration.

4. Learned counsel for the petitioner submitted that bill for the work executed by the contractor was paid on 5.12.2003. However, royalty clearance certificate dated 24.3.2004 issued by the Collector was received on 24.3.2004 and proposal for release of the security deposit was sent on 10.4.2004 and the bank guarantee of Rs.1,50,000/- submitted towards security deposit was returned only on 2.9.2004, therefore, payment dated 5.12.2003 cannot be termed as final payment as by this time security deposit deducted during work was refunded. It was further argued that the contractor had sent several letters to the respondents for releasing the withheld security deposit of Rs.6,20,000/- and ultimately notice for settlement of dispute as per provisions of the arbitration agreement was sent on 2.9.2004 and request for appointment of sole arbitrator within 30 days of receipt of the said notice was made. Therefore, objection of the railway based on Clause 64 (1)(iv) of GCC that even after finalization of the bill, the contractor did not prefer any specific claim in writing within a period of 90 days, tantamount to waiver of his claim, is not acceptable. It was contended that vide document of Annexure R/6 the contractor had given final clearance certificate, however, dispute of the petitioner relates to refund of the security deposit, which was deducted by the railway department contrary to the recommendation that full and final refund of security deposit be made to the petitioner.

5. Reliance is placed on the decisions in the matter of **SBP & CO. Vs. Patel Engineering Ltd. and another**, **(2005) 8 SCC 618** and

Chairman and MD, NTPC Ltd. Vs. Reshmi Constructions Builders and Contractors, (2004) 2 SCC 663.

6. On the other hand, learned counsel appearing for the respondents/Railways submitted that Clause 9.1(ii) of the GCC makes a provision that where the contractor fails to supply full quantity of ballast which is scheduled for supply in any quarter, a penalty equivalent to 10% of the cost of such shortfall in ballast supply during that quarter shall be recovered from his bills and accordingly, because of short supply of ballast for the quarters mentioned in paragraph 8 of the reply, penalty of Rs.5,73,889/- was imposed on the petitioner. Final bill was prepared and paid to the petitioner on 6.1.2004, however, the contractor did not prefer any specific and final claim in writing within 90 days of finalization of the bill and therefore, he waived his claim under the contract agreement as per Clause 64(1)(iv) of the GCC. Security deposit submitted by the petitioner through bank guarantee was refunded to him on 24.8.2004. The petitioner had already furnished 'No Claim Certificate' of Annexure R/6 on 10.4.2004 whereby he has declared that he has no further claim of any sort nor any disputes against the above works and in the light of above facts, the Chief General Engineer, SECR, Bilaspur vide his letter dated 29.4.2004 and General Manager SECR, Bilaspur vide his memo dated 24.1.2005 informed the petitioner that the matter cannot be referred to arbitration as contractor has failed to observe provisions of Clause 64(1)(iv) of GCC Vol. II vide Annexure R/2.

7. Reliance is placed on the decisions in the matters of **Chairman and MD, NTPC Ltd. Vs. Reshmi Constructions Builders and Contractors (supra)** and **Bharat Coking Coal Ltd. Vs. Annapurna Construction, (2003) 8 SCC 154.**

8. I have heard learned counsel for the parties and perused the material on record.

9. From the pleadings of the respective parties and the standard specification, which is also applicable to the contract between the parties, existence of arbitration agreement as defined in the Act and that the petitioner and the respondents are parties to such agreement, is established. It is also not in dispute that cause of action arose to the petitioner within the jurisdiction of this Court. However, in the

light of objection raised by the respondents that final bill was prepared on 5.12.2003, the same was passed on 6.1.2004, petitioner did not submit any final claim in writing within a period of 90 days as per provisions of Clause 64 (1)(iv) of GCC and accordingly, he waived his right under the agreement and submitted a 'No Claim Certificate' of Annexure R/6 on 10.4.2004 and therefore, parties have concluded the transaction by recording satisfaction of their mutual rights and obligations by receiving the final payment without objection, payer of the petitioner for appointment of arbitration is to be examined.

10. The respondents have categorically stated in their reply that penalty was imposed for short supply of ballast as per arbitration agreement as detailed in paragraph 8 of the reply. Deduction towards penalty dates back to the year 1995-96. The petitioner has admitted in his petition that bills for work executed were paid to him on 5.12.2003 i.e. the date of final bill. He has also not disputed the execution of 'No Claim Certificate' which was given by him after the date of final bill i.e. 10.4.2004.

11. In the matter of *Chairman and MD, NTPC Ltd.*(supra) in paragraph 36 it has been held thus:

> *"36. The appellant has in its letter dated 20.12.1990 used the term "without prejudice". It has explained the situation under which the amount under the "No-Demand Certificate" had to be signed. The question may have to be considered from that angle. Furthermore, the question as to whether the respondent has waived its contractual right to receive the amount or is otherwise estopped from pleading otherwise, will itself be a fact which has to be determined by the Arbitral Tribunal."*

12. In the above matter on the basis of pleadings and the documentary evidence available on record, the contractor has pleaded that he was made to sign No Claim Certificate under influence of coercion and the Hon'ble Supreme Court considering the conduct of the parties as evidence in their letters observed that not only the final bill submitted by the contractor was rejected but another final bill was prepared with a printed format of No-Demand Certificate and the same was executed by the contractor or otherwise the final bill would not be paid to him, observed that assertion of the contractor of being under influence of coercion, cannot be considered by way of an afterthought. However, in the instant case there is no such pleading by the

petitioner nor any document has been filed to show that the petitioner was made to sign No Claim Certificate under the influence of coercion.

13. In the matter of *Bharat Coking Coal Ltd.* (supra) the contractor has accepted the final bill and it was not case of the company that while accepting final bill the contractor has unequivocally stated that he would not raise any further claim and in the absence of such declaration, it was held by the Hon'ble Supreme Court that the contractor cannot be estopped or precluded from raising any claim. However, in the instant case, the petitioner has not only accepted the final bill without any objection but he has also not disputed No Claim Certificate making unequivocal declaration that he does not have any further claim of any sort nor any disputed claim against the above work executed. He also did not raise any final claim within a period of 90 days of finalization of bill as per Clause 64(1)(iv) of GCC. In these circumstances, it is held that the parties have already concluded the transaction by recording satisfaction of their mutual rights and obligations by receiving the final payment without objection.

14. On the basis of aforesaid discussions, the instant application for appointment of sole arbitrator, being without substance is liable to be rejected and is accordingly, rejected.

Sd/-
Dhirendra Mishra
Judge

K/-